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No. 489

In the Supreme Court of the United States

October Term 1947.

MARY MORTON WEST, OSAGE ALLOTTEE NO. 192,
Appellant,

vs.

OKLAHOMA TAX COMMISSION.

Appeal from the Supreme Court of the State of Oklahoma.

REPLY BRIEF of APPELLANT.

FRANK T. McCOY,
JOHN T. CRAIG,
JOHN R. PEARSON,
FRANK MAHAN,
Counsel for Appellant.

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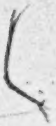

IN THE SUPREME COURT OF THE UNITED STATES.

October Term 1947.

No. 489

MARY MORTON WEST, OSAGE ALLOTTEE NO. 192,
Appellant,

vs.

OKLAHOMA TAX COMMISSION.

REPLY BRIEF *of* APPELLANT.

As briefly as possible we shall reply to the various contentions made in the answer brief of the appellee.

It is not clear to us just what opposing counsel mean in suggesting that "the right of Oklahoma to impose a tax on all of the properties included in the assessment, is now before the court unless the concession of appellant at page 14 of her brief be considered as a withdrawal of the protest as to *all* real estate included in the assessment." If by this is meant that we are conceding the taxability of the homestead, we make no such concession. The Oklahoma Tax Commission held the homestead exempt (R. 16), and the Supreme Court of Oklahoma pointed out in its opinion (R. 33) that "It is conceded the allotted homestead is nontaxable and the Commission made no order taxing it under the above statute." Therefore, the question of the taxability of the homestead is not now before this court.

We believe we have fully distinguished the *Five Tribes* case in our original brief, and in answer to appellee's analysis of that case we merely point out that the rule is well settled that:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."
>
> —*Rathbun* v. *United States,* 295 U. S. 602, 79 L. ed. 1611, 1618.

In our judgment, neither the fact that the Osage Indian is a citizen of the United States, as emphasized in appellee's brief, nor the attempted distinction between an estate tax and an ad valorem tax answers the contentions made in our original brief. As pointed out at page 32 of our brief, by Section 3 of the Act of Congress of March 3, 1921, Congress provided that the conferring of citizenship upon the Osages did not affect their interest in tribal property or the control of the United States over such property. Nor did the citizenship of the Indian in *United States* v. *Board of Commissioners,* 145 F. (2d) 329, cause the Tenth Circuit Court of Appeals to depart from the rule that property held in trust by the United States for an Indian or a tribe is not subject to state taxation.

So far as the nature of the tax is concerned, whether ad valorem or excise, the principle is the same if the power to

levy the tax is wanting. This is likewise true as to the degree of interference with the federal government in the administration of the trust estate. Both in this case below and in the *Five Tribes* case the homestead is treated as exempt from the estate tax because it is exempt by statute from ad valorem tax. Surely, a constitutional exemption, even though only by implication, would be as effective to exempt the property under consideration from estate tax as from an ad valorem tax. Indeed, we urge that the constitutional exemption should have greater force and dignity than a mere statutory exemption. In this connection it should be kept in mind that it has been stipulated in this case that the classes of property under consideration have never been subjected to taxation.

Counsel argue the triviality of the burden cast upon the federal government by the proposed tax, but if the principle for which we contend applies, the extent of the interference is immaterial.

In *Johnson* v. *Maryland*, 254 U. S. 51, 56, 65 L. ed. 126, 128, it was said:

> "* * * With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today."

And in *Indian Motorcycle Co.* v. *United States*, 283 U. S. 570, 575, 75 L. ed. 1277, 1281, in discussing the principle this court stated that:

> "* * * Where the principle applies it is not affect-

ed by the amount of the particular tax or the extent of the resulting interference, but is absolute."

Next, under the heading that "The Restricted Osages Have a Restricted Fee Simple Title," counsel discuss at some length the title of the Osage Indian, including the title to the land allotted to him. The question of title to the land may be waived aside as in no wise involved in this appeal. It is conceded that all of the land, except the homestead, is includable for estate tax purposes because specifically made subject to taxation by Congress. But the title to the mineral interest and to funds arising therefrom is altogether a different question. To us it seems an absurdity to argue that title to the mineral interest is in the individual Indian, in view of the deed given by the Cherokees to the United States, the subsequent severance of the surface and the minerals, and the express provisions of the various Acts of Congress reserved the minerals for the use of the tribe and extending the period for which the same are to be held in trust by the United States for the tribe.

It is stated in appellee's brief that we insist that under Section 5 of the Allotment Act it will be necessary, at the expiration of the trust period, for the United States to issue deeds to the mineral interest. We know of nothing in our brief that may be so construed, but if there is, it was not so intended, as such a thought never occurred to us. Nor can we agree with opposing counsel that "at no time will an original allottee, or his successors in title, ever own all of the minerals under any particular allotment." Such view, in our judgment, finds no support in any Act of Congress. Section 2 of the Allotment Act (34 Stat. 539) provides that:

"* * * the oil, gas, coal and other minerals upon

said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress."

There is no provision anywhere in any of the Osage Acts indicating that the severance was for all time to come, as contended by counsel, and the meaning of the above provision of Section 2 is clearly to the contrary.

While on this question of title we desire to point out the strange and utter inconsistencies in the Oklahoma decisions on the question, but in so doing we do not wish to be understood as intending any disrespect whatever toward the Supreme Court of Oklahoma. At page 13 of our original brief we cited and quoted from the case of *McKnight* v. *Panther,* 190 Okl. 127, 120 P. (2d) 973. In that case, in an action by a private citizen, creditor of an Osage Indian, it was held plainly and without qualification that title to funds accruing from the Osage mineral interest "still remained in the Government until such time as the check was presented for payment and properly cleared." This holding is altogether irreconcilable with the holding of the lower court in the present case, yet we have not the slightest doubt that were the question again presented to that court in another case involving the claim of a private citizen the court would adhere to its position in the *McKnight* case.

It is, we believe, wholly illogical to apply one rule in the case of a private citizen, seeking to collect a just debt, and a different rule where the state is seeking to collect revenue. Both this court (*Hecht* v. *Malley,* 265 U. S. 144, 68 L. ed. 949) and the Supreme Court of Oklahoma (*Rollins* v. *Heuman,* 171 Okl. 435, 43 P. (2d) 147) follow the rule that statutes authorizing the levy of taxes are to be con-

strued most strongly against the government and in the taxpayer's favor, and it would seem that the rule would be the same as to the application of taxing statutes.

We insist that it does not answer the rule laid down in the *Rickert* case and similar cases to argue that the Osage Indian has the beneficial interest in the classes of property under consideration. That was true in the *Rickert* case, and it has been true in every other case in which this court and other federal courts have held that property held in trust for Indians by the United States is exempt from state taxation.

In this connection we call attention to the fact that the brief of appellee is in error in stating that in *United States* v. *Thurston County,* 143 Fed. 287, the "assessment was on lands" of the Indians. The effort of the taxing officials in that case was to tax money belonging to the Indians, on deposit in bank, the proceeds of the sale of lands.

Appellee's brief is also in error in asserting that in quoting from *Adams* v. *Osage Tribe,* 59 F. (2d) 653, we merely quoted the contention made by the United States. We also quoted the portion of the opinion which the court pointed out that the District Court had held that title to the minerals "is held in trust by the United States for the tribe's use and benefit." Surely we are entitled to assume that by affirmance of the judgment the Circuit Court of Appeals approved this holding of the lower court. We fail to see how any other conclusion could be logical or proper. The deed from the Cherokees clearly put the title in the United States, and so far as the mineral interest is concerned it still rests there, and will continue to rest there until the end of the trust period, at which time Congress has provided that the oil, gas, coal and other minerals shall

become the property of the individual owner of the land. Under such circumstances can it be said, by any process of logical reasoning, that at the time Mary Morton West died she was the owner of that of which her heirs or their successors in title would eventually become the owners at some uncertain and indefinite time in the future?

Counsel make the suggestion that more than seventy-five per cent of the oil from Osage lands came from surplus lands and less than twenty-five per cent from homesteads. We do not know what authority counsel have for this statement, as there is no such evidence in the record, but as we view the matter, by reason of the severance of surface and mineral rights, it makes not the slightest difference one way or the other whether all of the oil comes from under homestead lands or all from under surplus lands.

At one point in appellee's brief reference is made to "funds held in trust by the United States and which funds were and are credited to the individual Osage's account." The latter part of the statement is contrary to the stipulation of the parties, which provided (R. 13) that "Osage funds are paid to the United States Treasury and held by it undesignated as to members of tribe but simply as the Osage Tribal Trust Fund."

In discussing the *Rickert* case as applied to the Osage title counsel say that "title was held in trust by the United States when the *Rickert* case arose, but as stated in the opinion title passed when the provision of the Allotment Act has been carried out by the execution and approval of the deeds." We assume by opinion counsel mean the opinion of the lower court in the present case, but title to what passed by the execution and approval of the deeds? Certainly not title to the mineral interest, unless the provisions

of the Allotment Act that the minerals shall become the absolute property of the owner of the surface at the end of the trust period and of other Osage Acts extending the trust period are to be altogether ignored. To contend that title to all of the classes of property in controversy is not held in trust by the United States is to fly directly in the face of positive and repeated Acts of Congress.

Under their Proposition 2, counsel argue that the right to collect the tax is fully established by the *Five Tribes* case and by *Landman* v. *Commissioner*, 123 F. (2d) 787. But neither of those cases involved Osage estates, and we believe we have sufficiently pointed out the difference between the character of the tenure of Five Tribes property and that of Osage property.

Counsel have gone outside of the record in including in their brief certain tabulations showing the various amounts to the credit of individual Indians of different tribes and of the tribes themselves. This, we submit, has no bearing whatever upon the questions involved in this appeal. However, for whatever it may be worth, we point to the *Landman* case as a glaring example of the difference between the rights of the Osage in tribal properties and the rights of a member of the Five Tribes in his individually owned property. The opinion in the *Landman* case shows that over a period of twenty-one years the deceased had drawn from her individual funds a total of $444,811.90, or more than $21,000 each year. The Osage Indian had no such almost unlimited right, and upon his death his heirs have no such unlimited right. We insist that all the restricted Osage Indian has and all he passes to his heirs at his death is the right to a limited income for life, without authority or control over the corpus of the property from which the income arises.

Counsel state that in *Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418, 79 L. ed. 1517, this court disapproved of the holding in the *Blackbird* case, cited in our brief. Such disapproval was expressed, but merely by way of *dictum*, as the *Five Civilized Tribes* case did not, of course, involve an Osage question. The *Blackbird* case is still the law so far as federal income taxes on restricted Osages is concerned. (*Rathbun* v. *United States, supra.*)

Appellee admits that the allottee does not have "the right to lease and sell," and this lack of right, we believe, is a vital point in this case. Certainly, neither the restricted Osage nor his heir, if of any Indian blood, has any right whatever to sell either the mineral interest, future accruals to the headright or accumulated accruals in the Treasury of the United States, or bonds or other securities in which such funds have been invested. As pointed out by a quotation at page 32 of our original brief, the true test in a case of this kind is whether full and complete dominion over the property in a practical sense is fixed in the heir or transferee by the death of the decedent.

Under appellee's Proposition 3 the question is asked, If nothing passed upon the death of the decedent, why was the estate probated? Something did pass—the right to income, the same right the decedent had, which "was obliterated" by the event of his death so far as he was concerned, and which will be obliterated by the death of appellant, so far as she is concerned, if she dies prior to the expiration of the trust period as presently extended or may hereafter be further extended. We ask a counter question—Does appellee contend that upon the death of the decedent appellant came into full control of the corpus of the property held in trust by the United States? If she did, then so far as this

particular question is concerned, that corpus is includable in the gross estate. If she did not, then appellee has wholly failed to meet our contention on this point.

Certainly it must be conceded that the right to income is a valuable right, but estate or inheritance tax laws are not designed to act upon such a right. Income tax laws serve that purpose. Let us suppose that in the present case Mary Morton West had died within one year from the date she inherited the right to the income from this Osage property. The value of the right which she inherited is measured solely by the total income received by her before her death. But, it will be objected, she would pass the estate upon her death to her heir. But suppose that heir then died within one year. The illustration but serves to demonstrate the truth of the contention that until the end of the trust period the restricted Osage Indian does not have that degree of control over the corpus of the property which would justify the inclusion of it in his gross estate for estate tax purposes.

Certainly probate was necessary. It was necessary for a determination of heirs, persons who would be entitled to receive, not only the income from the classes of property which we contend are not properly includable in the gross estate for estate tax purposes, but also the corpus of the classes of property which we conceded are properly includable, such as purchased and inherited land, stipulated as subject to ad valorem taxation.

Appellee presents what to our minds is the rather astonishing argument that notwithstanding the severance of the surface rights from the mineral rights, "the Osages have always paid indirectly a tax on the minerals underlying their surplus lands because as the owners of the surface they paid an ad valorem tax thereon." This, in effect

amounts to the argument that the State of Oklahoma is taxing the individual Osage upon property which he does not own, for if language means anything at all, under the provisions of the seventh paragraph of Section 2 of the Allotment Act the owner of the land does not become the owner of the minerals until the end of the trust period. Clearly Oklahoma would not have the constitutional power to do that, but we submit that the application of the Oklahoma estate or inheritance tax law to the classes of property in question in the present case is just such an attempt.

Opposing counsel destroy their entire argument under their Proposition 3 by their reliance upon the case of *Gypsy Oil Co.* v. *Oklahoma Tax Commission,* 6 F. Supp. 6, and their contention that the case is "authority supporting the proposition that Congress does not consider that a diminishing of the properties of the Osages through a nondiscriminatory tax prevents the carrying out of any provision of the law requiring a delivery of the properties to the Osages intact at the expiration of the trust period." In that case the Gypsy Oil Company sought to enjoin the enforcement of an act of the Oklahoma Legislature imposing a tax of ⅛th of a cent per barrel upon oil produced under leases made with the Osage Tribe of Indians. The opinion was handed down on February 19, 1934. By a strange coincidence, on the very same day, in the case of *Barnsdall Refineries* v. *Oklahoma Tax Commission,* 171 Okl. 145, 41 P. (2d) 918, (cited and discussed at page 34 of our original brief) in the selfsame kind of suit brought for the same purpose, the Supreme Court of Oklahoma held invalid, as applied to oil produced under Osage leases, the Oklahoma law there under attack as not within the congressional withdrawal of immunity by the gross production tax law. And as pointed out in our original brief, this court (296 U. S. 521, 80 L. ed. 366)

affirmed the judgment of the Oklahoma Supreme Court, and treated the gross production tax law enacted by Congress (41 Stat. L. 1249; Section 5 of Act approved March 3, 1921) as a withdrawal of immunity to that extent and that extent only.

The argument that no immunity exists unless expressly granted by Congress is wholly without force in the face of congressional consent to tax in certain instances and this court's confining of the withdrawal of immunity strictly within the limits of the consent granted.

Under Proposition 5 opposing counsel again urge the remote and inconsequential effect of the proposed tax. We believe we already have answered this contention. If the principle for which we contend applies, the rule is absolute and the extent of the interference immaterial. (*Johnson* v. *Maryland, supra; Indian Motorcycle Co.* v. *United States, supra.*) We have fully discussed the matter of interference with the government's duty to the Osages (see pages 20 to 26 of our original brief), and do not believe we should further burden the court on this point.

Before closing this brief we believe we can demonstrate that the appellee is far less convinced of the soundness of its position than its argument would indicate. On August 22, 1944, even after the final order of the Commission assessing the tax (R. 15), there was introduced in the Senate of the United States at the request of the appellee, bill No. S. 2102, entitled "A bill relating to transfer, inheritance, and estate taxes on the transfer of certain properties of tribal and individual Osage Indians of Oklahoma," and providing as follows:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress*

assembled, That the tax exemptions contained in existing laws, treaties, or trust deeds or other instruments applying to the properties of Osage Indians shall not be construed to apply to transfer, inheritance, or estate taxes on the transfer of lands and personal property of Osage Indians, including trust funds held by the United States Government for the benefit of the Osage Tribe of Indians and individual Osage Indians, and including the value of what is commonly designated 'Osage Headright Interests,' but said properties shall, upon the death of the owner thereof, be subject to the Oklahoma transfer, inheritance, or estate taxes in the same manner and to the same extent as the laws of Oklahoma apply to the trust funds and other properties belonging to restricted members of the Five Civilized Tribes; *Provided, however,* That the homestead allotments of Osage Indians not having a certificate of competency shall be exempt from such transfer, inheritance, and estate taxes, while title remains in the original allottee of one-half or more of Osage Indian blood and in his allotted heirs or devisees of one-half or more of Osage Indian blood, until January 1, 1984; *And provided further,* That such tax-exempt land of the allottee, heir, or devisee shall not, at any time, exceed one hundred and sixty acres of land.

"Sec. 2. The provisions of this Act shall apply to transfers heretofore made wherein the estate has not been finally closed and a final distribution made by proper probate procedure, as well as to transfers occurring after the enactment thereof."

This bill was not enacted into law, and died with the Seventy-eighth Congress. While it may be true that failure to pass the bill should not be taken as conclusive evidence that Congress simply was not willing to withdraw the immunity conceded by the bill to be present under existing laws, treaties, etc., that is at least the implication, and cer-

tainly the effort to have the bill enacted is conclusive evidence that appellee and its counsel, almost from the beginning of this proceeding, have considered unsound their position as to the applicability of the Oklahoma estate or inheritance tax statutes to the classes of property involved in this appeal.

While there is a dearth of authority upon the question, we feel that we are entitled to call attention to the abortive attempt to have above bill enacted into law, though not shown by the record herein, for the reason that the court may take judicial notice of such attempt. *Gebelein* v. *Milbourne,* 12 F. Supp. 105, 119.

Conclusion.

From our discussion in this and our original brief it will be seen that two fundamental propositions inhere in our position: (*1*) Under the doctrine of the *Rickert* and other similar and later cases the classes of property in controversy must be held exempt from all forms of state taxation, and (*2*) because of the character of the tenure of such classes of property by the restricted Osage Indian, the Oklahoma statute as applied below impinges upon the rights of the Indian as vouchsafed to him by the Fourteenth Amendment to the Constitution of the United States.

We have no desire to discuss further point (2), other than to say that in our judgment appellee's brief does not adequately answer our contention.

As to the doctrine of the *Rickert* case, we urge that in view of the repeated references to that case as authority it will hardly suffice to attempt to waive it aside as outmoded and obsolete. The late case (1944) of *United States* v. *Board of Commissioners,* 145 F. (2d) 329, is, we be-

lieve, of great importance on this point. There it was the Indian's own money which went to purchase the land sought to be taxed, but title having been taken in the United States in trust, it was held that the property was immune from taxation. We call attention to the fact that the Circuit Judge (Tenth C. C. A.) who wrote a dissenting opinion in the *Five Tribes* case substantially in agreement with the later decision of this court, concurred in the opinion in *United States* v. *Board of Commissioners,* thereby approving the distinction therein made between the *Rickert* case and the *Five Tribes* case.

Respectfully submitted,

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